SUPREME COURT OF THE UNITED STATES.

Nos. 170 and 171.—October Term, 1925.

The Chesapeake & Ohio Railway Company, Petitioner, 170 *vs.* Westinghouse, Church, Kerr & Co., Inc. Andrew W. Mellon, Director General of Railroads, Petitioner, 171 *vs.* Westinghouse, Church, Kerr & Co., Inc.	On Writs of Certiorari to the Supreme Court of Appeals of the State of Virginia.

[March 1, 1926.]

Mr. Justice Brandeis delivered the opinion of the Court.

These actions were brought in a state court of Virginia to recover amounts alleged to be due for the use of an engine and crew rented or assigned by the Chesapeake & Ohio Railway Company to Westinghouse, Church, Kerr & Co., Inc., under a contract made in September, 1917. The latter corporation was engaged in construction work for the Government on premises at Newport News connected by industrial tracks with the Railway's main line. Owing to war conditions, there was then serious congestion of traffic at Newport News, and the Railway failed duly to perform spotting service for the company. To remedy this condition the engine and crew were assigned to the exclusive use of its traffic, payment to be made therefor as prescribed in the contract. The use continued from that date until April, 1918. The Railway sued for the period prior to December 28, 1917; the Director General for that later. The defences were want of consideration and that the contract was void because it violated the Interstate Commerce Act and a similar law of the State. A judgment for the defendant, entered in each case by the trial court, was affirmed by the Supreme Court of Appeals on the ground of want of consideration. 138 Va. 647. This Court granted writs of certiorari. 266 U. S. 598. No question under the state law is before us.

The service of spotting cars was included in the line haul charge under both interstate and state tariffs. The Railway contends that under the tariffs no obligation rested upon the carrier either to furnish spotting service solely for the convenience of a shipper or to furnish him special facilities to meet abnormal and unprecedented conditions; that the contract was, therefore, not without consideration; and that, being for rental of equipment, it was not for a common carrier service and, hence, a contract therefor was legal under the Interstate Commerce Act, although no tariff provided for the charges. The service by special engine and crew contracted for and given was not spotting solely for the convenience of the shipper. It was the spotting service covered by the tariff. Compare *Car Spotting Charges,* 34 I. C. C. 609; *Downey Shipbuilding Corp.* v. *Staten Island Rapid Transit Ry. Co.,* 60 I. C. C. 543. It is true that abnormal conditions may relieve a carrier from liability for failure to perform the usual transportation services, but they do not justify an extra charge for performing them. The carrier is here seeking compensation in excess of the tariff rate for having performed a service covered by the tariff. This is expressly prohibited by the Interstate Commerce Act, Act of February 4, 1887, c. 104, § 6(7), 24 Stat. 379, 381, as amended. A contract to pay this additional amount is both without consideration and illegal. It is no answer that by virtue of the contract the shipper secured the assurance of due performance of a transportation service which otherwise might not have been promptly rendered; that ordinarily rental of engine and crew is not a common carrier service; and that such rental may be charged without filing a tariff providing therefor. Compare *Chicago, Rock Island & Pacific Ry. Co.* v. *Maucher,* 248 U. S. 359. To so assure performance to a shipper was an undue preference. Hence the contract would be equally void for illegality on this ground. *Davis* v. *Cornwell,* 264 U. S. 560.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.